No. 20270

In the

United States Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HARRAH'S CLUB,
Respondent.

Brief for Respondent

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INTRODUCTION AND STATEMENT OF ISSUES

The present case presents three major questions:

1. The first is whether the Board's unprecedented assertion of jurisdiction over the legal gambling industry in Nevada is within the Board's reasonable discretion in light of its continuing declination of jurisdiction over the horse racing industry.

2. The second concerns the discharge of Wetherill and is whether the Board's finding that he was discharged because of his union activities is supported by substantial evidence. This issue involves a unique effort by the Board to transmute the replacement of an employee by a returning veteran into an unfair labor practice.

3. The final issue is whether substantial evidence supports the finding of 8(a)(1) violations.

It will be shown that the Board's position is unsupportable with respect to each of these. With respect to the jurisdictional question, it will be seen that the Board's view rests on an argument—namely, the importance of the industry to the state—which is one of the very reasons given by the Board for *not* asserting jurisdiction over race tracks. As concerns the discharge and the claims of 8(a)(1) violations, analysis of the record as a whole will show that the Board's conclusions do not rest on substantial evidence.

I.

THE BOARD'S ASSERTION OF JURISDICTION IS ARBITRARY AND AN ABUSE OF THE BOARD'S DISCRETION

A. The Board's Discretion in Asserting or Declining Jurisdiction Cannot Be Arbitrarily Exercised.

Preliminarily, we note that the Board has wide discretion in the assertion of its jurisdiction: by decision or rule it may decline to assert it over any labor dispute "where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."[1] But, of course, the Board's discretion is not unlimited. Courts will set aside exercises of discretion that are arbitrary, unreasonable or capricious.[2] The Administrative Procedure Act, 5 USCA

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1. 29 USCA § 164(c)(1), and cases cited in Board brief at 29.

2. Courts sometimes state this by saying that they will not set aside the Board's determination unless it is arbitrary or discriminatory. *N.L.R.B. v. W. B. Jones Lumber Co.* (9th Cir. 1957), 245 F.2d 388, 390. In *N.L.R.B. v. Swinerton* (9th Cir. 1953), 202 F.2d 511, 516, this court said concisely:

> "Whether the Board should assume jurisdiction in respect to a particular industry is in the absence of abuse of discretion exclusively for the Board."

A decision illustrating such an abuse through the retroactive application of a changed jurisdictional standard is *N.L.R.B. v. Guy*

§ 1009(e), provides that the reviewing court shall "set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * *"[3]

B. The Board Acted Arbitrarily by Refusing to Follow Its Horse Racing Decisions.

Is there an essential difference—a difference going to the exercise of N.L.R.B. jurisdiction—between betting on the horses in California and crap shooting in Nevada? Since the Board feels there is, respondent now addresses itself to this fascinating question. We consider first what the Board held in its horse racing decisions and why. Next we examine the applicability of these decisions to the situation at hand. We find that the Board's effort to avoid their impact cannot stand the light of reason.

1. THE HORSE RACING CASES AND THEIR RATIONALE.

Since 1950 it has been the consistent policy of the Board not to exercise its jurisdiction over racetracks. *Los Angeles Turf Club, Inc.* (1950), 90 N.L.R.B. 20; *Hotel & Restaurant Employees Union (Resort Concession, Inc.)* (1964), 148 N.L.R.B. No. 20; *Walter A. Kelley* (1962), 139 N.L.R.B. 744; *Meadow Stud, Inc.* (1961), 130 N.L.R.B. 1202; *Hialeah Race Course, Inc.* (1959), 125 N.L.R.B. 388; *Jefferson Downs, Inc.* (1959), 125 N.L.R.B. 386; *Pinkerton National Detective Agency, Inc.* (1955) 114 N.L.R.B. 1363.

F. Atkinson Co. (9th Cir. 1952), 195 F.2d 141. For a more recent illustration of this Court's concern over arbitrary Board action, in an area other than jurisdiction, see *N.L.R.B. v. Sebastopol Apple Growers Union* (9th Cir. 1959), 269 F.2d 705, 707.

3. This provision applies to review of Board orders. E.g. *N.L.R.B. v. E & B Brewing Company* (6th Cir. 1960), 276 F.2d 594, 600.

The Board extends its declination of jurisdiction not only to race tracks, but to breeders of race horses (*Meadow Stud, Inc.* and *Walter A. Kelley, supra*) and—of particular interest here—to food concessionaires at a racetrack (*Hotel & Restaurant Employees Union, supra*). The Board explained its reasons as follows in *Hialeah Race Course, Inc., supra,* 125 N.L.R.B. at 390-391):

> ". . . it is our opinion that the effect on commerce of such labor disputes is not sufficiently substantial to warrant the exercise of the Board's jurisdiction. In the first place, in *Los Angeles Turf Club,* the Board had occasion to consider racetrack operations of comparable size and character to the ones involved herein, and found that such operations, although not wholly unrelated to commerce, were essentially local in character. The instant record does not compel a contrary conclusion, and, for the same reasons, we find that racetrack operations are essentially local in nature. In the second place, Board declination of jurisdiction will not leave the labor relations of such operations unregulated. Congress, in addition to establishing the Board's discretionary authority to decline jurisdiction, specifically provided for State assumption of jurisdiction in such situations. Given the character of racetrack operations, which are permitted to operate by reason of special State dispensation, and are subject to detailed regulations by the States, we can assume that the States involved will be quick to assert their authority to effectuate such regulation as is consistent with their basic policy. In these circumstances, we anticipate little interference or obstruction with commerce resulting from labor disputes in the racetrack industry as a result of our decision to decline to assert jurisdiction over such operations."

Recently the Board has emphasized the second line of reasoning—the existence of extensive state regulation and

the likelihood that the states will not tolerate drawn-out labor disputes in this field.[4]

2. THE BOARD'S REASONS FOR DECLINING JURISDICTION OVER RACETRACKS ARE EVEN MORE STRONGLY APPLICABLE TO THE PRESENT SITUATION.

Horse racing is conducted in twenty-eight states;[5] other forms of gambling are legal only in Nevada. Racing involves a constant movement across many state lines of jockeys, trainers, owners, horses, employees and of those who desire to improve the breed by their wagers. Racing results and other racing information are transmitted and reported throughout the nation.[6] Gambling admittedly at-

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4. Thus in *Walter A. Kelley*, *supra*, 139 N.L.R.B. at 747, the Board, in declining jurisdiction, said:

> "We do so for the following reasons:
>
> "Horseracing as it now exists is a State-created monopoly, subject as such to extensive local regulations. Practically every individual working at a track, including grooms and exercise boys, the employees involved in the proceedings, must be licensed by State regulatory authorities. Because of the important revenue derived from racing activities, State governments have a strong interest in insuring uninterrupted operations at racetracks. This interest extends not only to the tracks, but to the owners and trainers of horses without whom tracks could not operate. Consequently, unless the hands of State authorities are tied, no labor dispute in this industry is likely to be permitted to last sufficiently long to interfere seriously with interstate commerce. We believe that, because of the unique nature of the racing industry, the regulations of labor matters governing employees should be left to the States, which under Section 14(c)(2) are in a position to assume jurisdiction if the Board declines to do so. The Board's limited resources can be better devoted to industries and operations where labor disputes are likely to have a more substantial impact on commerce than disputes in the racing industry."

5. *Statistical Reports on Horse Racing in the United States for the Year 1964* (The National Association of State Racing Commissioners, Feb. 1965) Table No. 1 (hereafter cited "Statistical Reports.")

6. Through various media, e.g., the daily press, television, radio and such special publications as the Daily Racing Form.

tracts visitors to Nevada, but—to put it mildly—it is at least as "local" in character as horse racing. The Board, in its brief, stresses the tourist aspect. It does not mention that far more people go to the races than to Nevada Casinos.[7] Nor does the Board mention that in *Los Angeles Turf Club, Inc.* and the decisions following it, the Board continually regarded such transportation as incidental to the "sporting events" and not altering their local character.

The main argument of the Board seems to be that gambling is an important industry in Nevada, supplying that state with a great deal of tax revenue and providing employment for many people. That is true enough but hardly pertinent. Horse racing provides vastly more tax revenue for the states permitting it than the revenue derived by Nevada from gambling. Indeed, racing provides more than twenty-five times as much revenue to the states.[8]

Nor can the Board derive comfort from contending that gambling is more important to the economy of Nevada, the one state where it is legal, than horse racing is to the economy of the states permitting racing. This only underscores the relatively local nature of legalized gambling. More importantly, in making this argument the Board has switched its reasoning from the racetrack cases. For the Board did not rest those decisions on the ground that racing was not important to the economy of the states involved. On

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7. Horse racing attendance was 60,595,000 in 1964. *Statistical Reports*, note 5, *supra*. The Board's brief refers to 20,000,000 Nevada visitors. The brief is silent whether all of them attended casinos.

8. The Board's brief, p. 30, states that the tax revenue to the state of Nevada from gambling is $13.7 million. Revenue to states from horse racing was $350 million in 1964. *Statistical Reports*, note 5, *supra*. Five states had racing revenues in excess of $14 million: California ($45.4 mill.), Florida ($14.8 mill.), Illinois ($27.8 mill.), New Jersey ($28.6 mill.) and New York ($140.0 mill.). See also *Fortune* Magazine, Jan. 1966, page 159, dealing with syndication in horse racing involving a business running into billions of dollars.

the contrary, the Board stressed the importance of racing to the states, saying, as already noted, that "(b)ecause of the important revenue derived from racing activities, state governments have a strong interest in insuring uninterrupted operations at racetracks."[9]

This strong interest of the state in not having labor disputes disrupt horse racing is, in light of the Board's own argument, even stronger as to Nevada gambling. For, if the latter is as important to the economy of Nevada as the Board claims, then the state would have an even greater interest "in insuring uninterrupted operations." Thus the vice of the Board's position and its arbitrariness is that in the racing cases it declines jurisdiction because the state has a great interest and here it seeks to assert jurisdiction for the same reason.

The states' interest in racing is borne out by the presence of extensive state regulation. Gambling in Nevada is regulated extensively, including detailed provisions governing licensing and far-reaching supervision of the entire industry.[10] Contrasted to racing, the situation is an *a fortiori* one. The Board, rather than recognizing that the identical reasons for accepting state regulation of racing as a ground for declining Board jurisdiction are present even more forcefully here, makes a number of wholly untenable arguments in an effort to confuse the situation. These are considered in the section immediately following.

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9. *Walter A. Kelley, supra,* 139 N.L.R.B. at 747.

10. Since the Board in its brief admits that extensive regulation is present, this matter will not here be covered in detail. The Nevada statutory law concerning gambling is contained in Nev. Rev. Stats. Secs. 463.010-465.000. This is supplemented by comprehensive regulations of the Nevada Gaming Commission and State Gaming Control Board; these regulations have the force of law. Regulation of horse racing is less detailed. Nev. Rev. Stats. Secs. 466.010-466.220.

3. AN ANALYSIS OF THE BOARD'S ARGUMENTS AS TO STATE REGULATION SHOWS THAT THE RACETRACK CASES ARE INDISTINGUISHABLE.

The Board's arguments on this issue (Brief pp. 31-33) are a model of how to make distinctions without a difference, of how to becloud rather than clarify a question.

First, the Board cites decisions to the effect that "where the enforcement of a state statute impairs, qualifies or in any respect subtracts from any of the rights guaranteed by the National Labor Relations Act, such provisions are ineffective to the extent of such conflict." True. But the Board here is not contending that there is any such conflict—that any Nevada statute interferes with any right granted by the Act. In fact, the Board argues next that the Nevada Gaming Act is not intended to govern employer-employee relations.

This contention is equally irrelevant. State regulation of horse racing often also does not govern employer-employee relations.[11] What the Board stresses in many of the racing cases, such as *Walter A. Kelley,*[12] is that the state involved has extensive licensing provisions. The Board has not required that horse racing regulations cover labor-management regulations; why should such a requirement be imposed here? In fact, in *Hotel & Restaurant Employees Union* and in *Pinkerton National Detective Agency, Inc., supra,* the employees involved were not even covered by the regulations applicable to persons engaged in the racing industry; nevertheless the Board declined jurisdiction over restaurant employees and detectives working at a track. By

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11. Thus, in California the state does not purport to regulate collective bargaining in the horse racing industry. Bus. & Prof. Code Secs. 19400 ff. (Horse Racing Law); Tit. 4 Calif. Administrative Code. ch. 4 (regulations of California Horse Racing Board). Yet it was in a decision involving a California racetrack that the Board laid down its principle of not asserting jurisdiction. *Los Angeles Turf Club* (1950), 90 N.L.R.B. 20.

12. See quotation from this decision at note 4, *supra.*

the same token jurisdiction over the employees here involved should be declined.

Finally, the Board contends that union representation of the employees here involved would not interfere "with the state's administration of the strict standards imposed." Let us assume, for the sake of discussion, that this is so. Yet, in the racetrack cases the Board never considered whether unionization would interfere with state regulation; it is not apparent to the ordinary mind how it would do so any more on a racetrack than in a gaming casino. In other words, the Board's contention is no more applicable to Nevada gambling than to horse racing.

C. The Assertion of Jurisdiction: the Government and Square Corners.

In its summing up of the jurisdictional issue, the Board emphasizes the importance of gambling to Nevada. From it the Board maintains that a labor dispute "could disrupt commerce substantially." The board does not explain how a dispute at a single casino could disrupt commerce any more than at a racetrack. The striking aspect of the Board's conclusion as to disruption is that the Board does not support it with a single fact, despite its extensive experience. The Board does not support this contention because it cannot. Indeed, it is apparent to any objective observer that a dispute in one casino out of the many located in Nevada is likely to be far less disruptive than a dispute at what might be the only large racetrack situated in a state. With all due deference to the Board's expertise, the Board's entire argument here substitutes fanciful contentions for both facts and law.

The Board's approach recalls the well-known comment in *Farrell v. County of Placer* (1944), 23 C. 2d 624, 628:

> "It has been aptly said: 'if we say with Mr. Justice Holmes, "Men must turn square corners when they

deal with the Government," it is hard to see why the Government should not be held to a like standard of rectangular rectitude when dealing with its citizens.' (48 Harv. L. Rev. 1299.)"

It is hardly rectangular rectitude to treat persons differently by making distinctions that have no basis in fact. No citations are needed to the effect that the guarantees of due process of law and equal protection of the laws have the same meaning. The Board's case rests on such distinctions. In the racetrack cases the Board relies on the local nature of racing—despite extensive interstate movement of people and animals and the intimate relation of racing to allied interstate industries such as totalisators and racing publications.[13] Here, the gaming business, confined to one state, is at least as local. The fact that tourists from other states come to Nevada does not alter this local nature. Not only do tourists come to tracks but many employees in the racing industry move from state to state. In the racetrack cases the Board stresses the importance of racing to the state. Here it stresses the importance of gaming to the state to support the opposite conclusion. Oh, brave new world.

II.

THE DISCHARGE OF WETHERILL WAS LAWFUL; THE BOARD'S FINDINGS THAT IT WAS DISCRIMINATORY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Circumstances of the Discharge Were Unequivocal and Non-Discriminatory.

1. THE RETURN OF A VETERAN.

About July 1, 1963, Arthur Barkow, a supervisor in the Entertainment Department at Harrah's Club at Lake

13. *Los Angeles Turf Club, Inc., supra.*

Tahoe,[14] received a letter from Charles Walker. The letter was dated July 27, 1963, and was on the stationery of Company A. 143d. Signal Battalion, APO 39, New York, New York. In it Walker wrote that he had "dreamed of the day when I can leave here and return to Lake Tahoe." He also stated in this letter that he "should leave here on 21 July and should be in New York and out by the first of August. I should be back and ready to go to work sometime around the end of August." (GC Exh. 3(a) & 3(b)). On or about August 7, 1963, a letter from the Regional Director of the Bureau of Veterans' Re-employment Rights, United States Department of Labor, concerning Walker was received by respondent. This letter referred to Walker and stated among other things that he "was formerly in your employ, and has recently been released from military service. At the time of separation he requested specific information about his reemployment rights; it is possible that he already has been in touch with you." This letter also stated "we want to be of service both to you and to this ex-serviceman if he desires to return in accordance with reemployment legislation." Accompanying this letter was a form requesting certain information pertaining to such matters "as pay, promotional opportunities, and other benefits based on seniority accrued during his service in the armed forces" (Respd's Exh. 1). The form was completed and returned to the Bureau (Tr. 337-338).

Upon receipt of the letter from the Bureau, Robert Vincent, Director of Entertainment at Harrah's Tahoe Club, and Robert Brigham, Director of Industrial Relations for respondent, discussed how to obey "the mandate of the

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14. Barkow's title is producer. As such he has certain responsibilities for the production of shows in respondent's South Shore Room.

law." This was the first such experience that Vincent had with a returning veteran (Tr. 337, 558, 560). Vincent told Brigham that he could not absorb another man and would have to let someone in the stage crew go in order to find a place for Walker (Tr. 339).

Sometime in the middle of August, Walker telephoned Barkow and arranged to come to Tahoe the next day, where he conferred with both Barkow and Sy Lein, the Stage Manager, concerning his return to employment (Tr. 176-177). Walker told them he wanted to return to his job about the first of September. This was agreeable to Barkow (Tr. 176-177). It was agreed that he would report for work about the first of September (Tr. 596). Walker left both an address and two telephone numbers where he could be reached in case he was wanted sooner. (Tr. 178).

Subsequently, on August 30th because of a rather important production which was to be presented, it was thought desirable to have Walker return a day or so sooner so that he could participate in tearing down of the old show and setting up the new show and thus become acquainted with the new show which would run through a part of September. Barkow telephoned him on that day and asked him to report the next day. Walker arrived at Tahoe on August 31st and went to work that night (Tr. 178-179, 710).

2. THE TERMINATION OF WETHERILL.

Following the receipt of the letter from the Bureau of Veterans' Reemployment Rights, Vincent, as mentioned, discussed with Brigham how to handle the situation. Brigham told him that the requirements of the law would have to be carried out. Vincent said in order to make a place for Walker he would have to let a man go and the logical

one would be the youngest man in point of service in the Entertainment Department (Tr. 340). He examined the personnel records for the seniority of the men and it appeared that Robert Wetherill had the least seniority among the stage crew (Tr. 340-341, 559-560).

With the return of Walker on August 31; after the second show on the morning of September 1st and in accordance with the custom and practice not only at Harrah's but in the gaming industry, Wetherill was informed by Barkow, at the request of Vincent, that he was to be terminated effective as of then (Tr. 27-29, 705, 707, 721-722, 844-845, 849-852, 855-856, 868-870).

When, as stated, it was determined from the personnel records that Wetherill was the stage techician with the least seniority, Vincent told Barkow to inform Wetherill of the situation necessitating his termination. The direct-in-line supervisor of the stage technicians was Lein, the Stage Manager. He was directly under Barkow who in turn was under Vincent (Tr. 425, 507-508, 553-554, 722). Lein was out of town and following the normal supervisory channels, Barkow in a telephone conversation with Lein inquired as to when he was returning to Tahoe. Upon learning that Lein would not be back the next night, which was the night that Wetherill was to be terminated, Barkow told Lein that he, Barkow, would inform Wetherill of his termination (Tr. 594-595, 705-707).

Barkow on August 30th told Lovelady that Wetherill was to be terminated to make room for Walker, a returning serviceman, and requested Lovelady, who at times engaged in supervisory duties in the absence of Sy Lein, to tell Wetherill the next night to see Barkow (Tr. 77-78, 595, 705-706). The next night Lovelady sent Wetherill to Barkow and Barkow then told Wetherill of his discharge and

the reasons therefor (Tr. 119-120). Wetherill asked whether his discharge had anything to do with his union activities. Barkow denied that this was the reason for his discharge (Tr. 706-709). A termination slip was given Wetherill by Barkow, which stated the reason for termination was "To make room for a returning serviceman" (Tr. 120). Lovelady saw this slip which he put in Lein's desk at Barkow's request, for Lein's signature (Tr. 120).

3. THE TRIAL EXAMINER'S FINDINGS CONFLICT WITH HIS CONCLUSION THAT WALKER'S RETURN WAS NOT THE REAL REASON FOR THE DISCHARGE.

The examiner agreed that there is no question "regarding Walker's seniority or his right to the job." (R. 41, line 11) More importantly, the examiner found as follows concerning the discussion between Brigham and Vincent relating to compliance with the veteran's reemployment law (R. 41, line 16-22):

> "After discussing the size of the stage crew, Brigham asked Vincent whether he could "absorb another man." Vincent replied that he was already over-staffed, and he was being criticized for maintaining a much larger stage crew than any comparable casino in Las Vegas. Vincent asked Brigham whether there was any other place for Walker but Brigham said that it would be preferable to reinstate Walker to the job he had held before his induction."

This conversation is wholly inconsistent with the Board's theory that respondent used Walker's return as a pretext for firing Wetherill. If the respondent were looking for a pretext, why ask Vincent whether he could absorb another man? This clearly is not the conversation of men anxious to fire Wetherill.

Several pages later in his decision, the examiner seeks to turn this incident against respondent by saying (R. 46, lines 30-34):

> "It is significant that, although Vincent had steadfastly maintained that the stage crew had been overstaffed, he at no time took any steps to reduce the size of the crew *prior to the advent of the Union*. In this regard, it should be noted that the dismissal of Wetherill made no difference in the size of the crew, because his position was filled by Walker." (Emphasis supplied)

Here the examiner implies—without reference to any fact and unsupported by any evidence—that Vincent took steps to reduce the crew after the advent of the union. He did not. What Brigham had asked him was whether he could absorb another man and Vincent's comment was in response to this question. The very fact that the trial examiner could make such an argument to draw an unfavorable conclusion as to respondent's motivation, lucidly illustrates the baselessness of the conclusion.

B. The Evidence Relied on by the Board Does Not Show Discrimination.

The Board appears to rely on five elements in support of its conclusion (Board brief pp. 45 ff): (1) That respondent knew that Wetherill was active in the union; (2) respondent's alleged hostility toward the union; (3) the Board's contention that respondent made an "abrupt decision" not to increase the size of its crew; (4) respondent's alleged hastening of Walker's return and (5) the Board's rejection of respondent's claim that Wetherill had the least seniority. None of these contentions is sound.[15]

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15. The first four issues will be discussed in this section. The question of seniority will be considered in Section C, *infra*.

1. KNOWLEDGE OF UNION ACTIVITIES.

There is no dispute that respondent knew Wetherill was active on behalf of the union. The relevance of this knowledge is low since it is also undisputed that the company did not discharge others who were also active. In fact, Walker also supported the union (R. 27) and kept his job. Also, it bears noting that "(t)he fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as a result of such activities."[16] And, as the court said in *N.L.R.B. v. McGahey* (5th Cir. 1956), 233 F.2d 406, 413:

> "With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."

2. ALLEGED ANTI-UNION ANIMUS.

The claim of company hostility toward the union will be considered more fully in connection with the 8(a) (1) allegations. The following considerations are relevant here:

(a) The bulk of the alleged interferences, if they occurred at all, occurred after Wetherill's discharge and in most instances many weeks later. This is true, for example,

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16. *N.L.R.B. v. Citizen News Co.* (9th Cir. 1943), 134 F.2d 970, 974; *Osceola County Co-op. Cream Ass'n v. N.L.R.B.* (8th Cir. 1958), 251 F.2d 62; *N.L.R.B. v. Montgomery Ward & Co., Inc.* (8th Cir. 1946), 157 F.2d 486. And compare the Board's decisions in *Gold Merit Packing Co., Inc.*, (1963), 142 N.L.R.B. 28; *Mackie-Lovejoy Mfg. Co.* (1953), 103 N.L.R.B. 172; *John S. Barnes Corp.* (1950), 92 N.L.R.B. 589; *Stainless Ware Co. of America* (1949), 87 N.L.R.B. 138, and *Dixie Mercerizing Co.* (1949), 86 N.L.R.B. 285.

of the statement attributed to Vincent—one of only two specifically referred to in the Board's argument (Board brief p. 46). Vincent's statement was made, if at all, on October 16 or 17, six weeks after the discharge. Events after the discharge are not pertinent here. *Miller Electric Co. v. N.L.R.B.* (7th Cir. 1959), 265 F.2d 225.[17]

(b) It should be noted that Brigham pointed out to Lovelady the advantage of being a member of the IATSE union (Tr. 95, 136, 351-352, 373, 398); that Lein was a member in good standing of IATSE throughout his employment by Harrah's (including the time he supposedly made the statement critical of Wetherill, Tr. 589-590, 594); that William Harrah, respondent's president, personally told the stage crew that he was not opposed to the union (Tr. 130-131), and that respondent consented to the election (G.C. Exh. 2(b)).

(c) The relevance of the supposed 8(a)(1) violations to the discharge is, at best, very limited. Assuming for the purpose of analysis that the record supports a finding that any such violations occurred, it should be borne in mind that "the finding of 8(a)(1) guilt does not automatically make a discharge an unlawful one or, by supplying a possible motive, allow [the Trial Examiner or] the Board, without more, to conclude that the act of discharge was illegally inspired." *N.L.R.B. v. McGahey, supra,* 233 F.2d at 410, and cases there cited.

(d) Finally, an "unlawful motive 'is not lightly to be inferred. In the choice between lawful and unlawful motives,

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17. Vincent's version of the conversation includes no such statements (tr. 562-568). We recognize the trial examiner's right to make resolutions of credibility. The Board in its brief, however, persistently relates "facts" as if they were undisputed. Such an approach does not constitute substantial evidence on the record as a whole. E.g. *Salinas Valley Broadcasting Corp. v. N.L.R.B.*, note 20, *infra.*

the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one.'" *N.L.R.B. v. Dan River Mills, Incorporated,* (5th Cir. 1960), 274 F.2d 381, 385, quoting with approval from *McGahey; Salinas Valley Broadcasting Corp. v. N.L.R.B.* (9th Cir. 1964), 334 F.2d 604, 613. To put the matter another way, the burden of proof "is not met by showing that the company was hostile to the Union." *Peoples Motor Express v. N.L.R.B.* (4th Cir. 1948), 165 F.2d 903, 907; *N.L.R.B. v. Murray Ohio Mfg. Co.* (6th Cir. 1964), 326 F.2d 509, 514.

With this we turn to the two critical questions on which the Board's conclusion hinges: did respondent cancel a planned crew increase so as to have a pretext for claiming that Walker's return necessitated Wetherill's discharge, and did respondent "hasten" Walker's return for the same purpose? It will be seen that the Board's position on these questions wholly lacks evidentiary support, let alone the backing of substantial evidence.

3. THE ALLEGED DECISION NOT TO INCREASE THE SIZE OF THE CREW.

The Board's brief attempts to create an ominous situation. It maintains that respondent was planning to increase the size of the crew at about the time the veteran returned and that it cancelled this increase in order to have an excuse to discharge Wetherill upon Walker's return. The Board's argument is fiction; there was no planned crew increase and not even the trial examiner found that there was. At the very end of his conclusions concerning the discharge, the trial examiner said (R. 47):

> "Finally, the record discloses that early in August, 1963, in a discussion about the possible effect upon the stagehands of the new Wage-Hour Law, Producer Barkow told Lovelady that it appeared as if Respondent

> was faced with the alternative of scheduling a seven-hour day, six-day workweek, or hiring three additional stagehands, to avoid payment of overtime. Barkow volunteered that Lein and Vogt had been urging him to hire additional men because, as things were, Vogt had been obliged to do relief work at the spotlight and light board, and Lien had been complaining that he had been unable to give his men vacations and time off. The employment of the two additional men, Lein said, would relieve that problem."

This is something quite different from the sinister charge the Board now makes. The testimony of the Board's witness, Lovelady, on which the trial examiner's comment is based, shows that the discussion of the Wage-Hour Law was initiated by Lovelady and that Barkow was responding to it (Tr. 79-80). The context of the discussion was the possible application to respondent of amendments to the Wage-Hour law. The point discussed was that if the law applied to the stagehands, additional men might ultimately have to be hired. This was not a decision that confronted respondent at the time of the discharge because at that time it was not yet clear whether the law applied to the stage crew.[18] As the examiner notes (R. 47, note 54)—though the Board's brief does not—respondent obtained a ruling in November 1963 that the law did not apply to the stagehands. Thus, the uncertainty regarding the Wage-Hour law had no probative bearing on Wetherill's discharge. The Board's own brief makes this clear:

> ". . . Producer Barkow informed [Walker] that a new Wage and Hour law *might* cause more help to be put on (Tr. 174-175, 184). Barkow also told Lovelady that the new Wage and Hour law *might* cause the hiring of

18. This is clear from the examiner's decision, R. 47, Note 54. The Board's brief neglects to mention it.

three additional stagehands in order to avoid paying overtime (R. 47, Tr. 79-80)." (Brief 47, emphasis supplied.)

Clearly, this is not evidence of a definite plan to increase the size of the stage crew. Nor is the Board's position aided by its reference to a conversation concerning the possible employment of one Norman Julian (Brief 46-47). The employment for which Julian was considered was not on the stage crew but, as the examiner noted, as a relief man in the sound department and to do some lighting work (R. 43). The Board's present argument—made for the first time in the case—that the possible employment of Julian proves "that respondent had announced it was increasing the size of the crew by one man" is, to put it mildly, wholly erroneous. In fact, no such finding was made by the trial examiner; the Board's astonishing conclusion springs fresh from the minds of its present brief-writers.[19]

Where does this leave the Board's argument about the allegedly "abrupt decision" not to increase the size of the crew? There never was such a decision; there never had been a decision to increase it in the first place. Aside from the Board's irrelevant reference to Julian, there was—considering only the Board's own evidence—only a thought that in the event the new Wage-Hour law proved to be applicable, the stage crew might have to be increased. Is it the Board's view that because of this possible eventuality respondent should not have discharged Wetherill or anyone else to make room for Walker? This makes no sense: a ruling on the applicability of the Wage-Hour law was some

19. The sole relevancy which the examiner assigns to the Julian matter (and which General Counsel urged below) is that his possible employment and the transfer of McNerthney which might have taken place as a result have some bearing on McNerthney's duties and seniority (R. 43, lines 10-28).

time away;[20] why should respondent increase the size of its stage crew on the off-chance that it might have to do so later—a chance which, as it turned out, did not materialize?

The Board's approach on this issue is a classic illustration of substituting suspicion for evidence and of attempting to second-guess management. Far from being factual, the Board's position is not even logical.

4. THE ALLEGED "HASTENING" OF WALKER'S RETURN.

The Board's suspicions here are equally groundless. They are derived not just from a highly selective reading of the evidence, but of a selective reading of the testimony of the Board's witness, Walker, a witness on whom the Board almost exclusively pins its argument.

Thus, the Board says that "Walker had earlier agreed to start work on September 4" (Brief 48). Walker's testimony stated a little more accurately that he initially wanted to return to work in the middle of August (Tr. 200), that in the middle of August he met with Barkow (Tr. 176) and "set a *tentative* date of September 4th" for his return to work (Tr. 177-178; emphasis supplied.) At this meeting, *according to Walker*, he left with Barkow "two emergency phone numbers in Modesto and told him if he needed me earlier he could contact me there" (Tr. 178).

The clear import of this testimony is that there was nothing surprising or evil about the slightly early recall of Walker and that Walker realized that in the nature of the work this was a realistic possibility. The possibility became fact. On August 30 (still summarizing Walker's testimony), Barkow called Walker's home and left word for Walker to call him that evening (Tr. 178). Walker did that and Bar-

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20. The ruling that the law was not applicable to the stage crew was received by respondent on November 21 (R. 47, Note 54); Wetherill was discharged on September 1.

kow told him "he was sorry to cut my vacation short, but he needed me back here immediately, and he wanted me to go to work on the 1st of September" (Tr. 178).

This is fully consistent with Barklow's testimony. Barkow confirmed that Walker had left the two phone numbers with him (Tr. 710). He confirmed he called Walker to advance the date (*ibid.*). He stated the reason as follows (*ibid*):

> "(A)fter talking to Sy Lein we decided that Charlie (Walker) should come to work a couple of days earlier inasmuch as the Liberace set was going to be a little trickier than most of the scenery that was used, and we thought it was a good idea for Charlie to be there when the scenery was hung, so he would know how to operate it and be of assistance in getting it up and getting it down, which was pretty important."

All this testimony the Board neglects to mention. Instead it points darkly to the "unusual amount of manpower" needed for the set on which Walker went to work and to Walker's statement that, in the course of his telephone conversation with Barkow on August 30, he asked Barkow "if something had happened, if somebody had broken a leg or something, and [Barkow] said I should keep my mouth shut and he would talk to me later" (Brief 48). As to the need for manpower on the set, perhaps the trial examiner, had he been in charge of respondent's stage operations, would have done things differently. However, both the examiner and the Board studiously omit mention of the undisputed testimony that only five or six men of the 14-man stage crew worked on assembling the set (Tr. 609). In any event, the examiner's views as to when management should make a replacement are hardly pertinent; they are even less pertinent in light of Barkow's explanation that

he wanted Walker back so that Walker could familiarize himself with the scenery and learn to operate it. Barkow's testimony was backed by Lein's (Tr. 596). Would the Board really have been any more satisfied if respondent had kept Wetherill a few more days? We doubt it.

Concerning the telephone statement attributed to Barkow, he denied having made it (Tr. 711). Neither the Board nor the examiner mention this conflict (Brief 48; R. 46); the ignoring of conflicts in testimony is something different from the resolution of them.[21] Assuming, arguendo, that

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21. Pertinent to the Board's approach both here and in its entire highly selective recital of the record is this Court's comment in *Salinas Valley Broadcasting Corp. v. N.L.R.B.* (9th Cir. 1964), 334 F.2d 604, 614:

> "Nor can this court escape its responsibility for following the rule laid down in Universal Camera, supra, by saying the examiner and the Board were entitled to infer that Cohan was not telling the truth; that their appraisal of his credibility and motives must be controlling—regardless of what other evidence is in the record. To follow this path would require us to abdicate all appellate responsibility in this type of case. We could not ourselves study and weigh all the evidence in the case, and come to our own conclusions as to the reasonableness and fairness of the decision. We respect the Board's findings—but not to the point of disregarding all or any of the evidence in the case, 'when viewed as a whole.' "

The Board's attitude here is not an isolated case; instances can readily be multiplied. E.g., the Board quotes Jordan as considering himself "the logical one to be bumped" (Brief 18); it does not refer to Jordan's further testimony that he went to Wetherill and told Wetherill that he, Jordan, had more seniority (Tr. 278-279). E.g., the Board states that Barkow told McNerthney that the latter would be replaced by a returning veteran (Brief 19); it does not refer to Barkow's testimony that he said nothing about a returning veteran, but talked to McNerthney because the personnel section was considering discharging him because of his handicap (Tr. 717-718). E.g., the Board states that Lein told Jordan he "was a lucky son-of-a-bitch because they ruled Wetherill was the junior man" (Brief 22); one is tempted to ask "so what," but in any event the Board does not mention that Lein denied having said anything of the kind and that Lein's testimony merits particular attention because he was no longer employed by respondent when he testified and had at all times been a member in good

Barkow did make the statement, it is a long jump from it to a conclusion of illegal motivation in discharging Wetherill. If there was such a motivation, why offer to explain to Walker later? More importantly, if respondent was as anxious to rid itself of Wetherill as the Board would have it—if respondent was only waiting for a pretext to fire him—why would respondent wait to call Walker until August 30, when Walker was ready to go back to his old job in the middle of August?

To put this another way, the Board's pretext theory is based on the alleged "hastening" of Walker's return by four (4) days. Yet respondent failed to take advantage of an opportunity to replace Wetherill with Walker two or more weeks earlier.

The fact that respondent did not do this—did not avail itself of prior opportunities to discharge Wetherill—supports the precise opposite of the examiner's conclusion, for it tends to prove that respondent had no unlawful motivation. Applicable to this situation is the Board's statement in *Geilich Tanning Company* (1959), 122 N.L.R.B. 1119, 1128 (specifically affirmed on this point upon review, though reversed on other points not here relevant, in *Amalgamated Meat Cutters & Butcher W. v. N.L.R.B.* (1st Cir. 1960), 276 F.2d 34, 38):

> "On the contrary, the chronology of events herein is one of the principal reasons why we are persuaded that Reed's discharge was lawfully motivated. The Respondent was aware of Reed's activities on behalf of the Meat Cutters by late May or early June. Assuming that it determined to discharge Reed for his solici-

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standing of the I.A.T.S.E. union (Tr. 588-590). No useful purpose would be served by adducing further examples. To point up every such instance would unduly extend this brief; respondent's restraint in this regard is not to be taken as an acceptance of the Board's imaginative version of the events.

> tation, and was waiting only for a pretext to conceal its unlawful motivation, the Respondent had such a pretext as soon as Reed became involved in his dispute with Silvia and Camara around July 1. It had no reason to wait any longer, if we adopt the Trial Examiner's 'pretext' view . . .. As stated above, the Respondent did not discharge Reed until September 18. There is nothing in the record to show that the discharge coincided with any increase in the intensity of the Meat Cutters' organizing campaign. Reed testified that he signed up 'lots' of employees, but there is no evidence to indicate that he was more active in this respect about the time of his discharge than in May or June."

With changes of name and dates this could be written of the instant case. Here, as in *Geilich Tanning Company,* respondent did not seize opportunities for a "pretext" discharge. And here, as there, nothing in the record indicates that Wetherill was any more active on behalf of the union around the time of his discharge than earlier that month.

In accord, *N.L.R.B. v. Threads, Inc.* (4th Cir. 1962), 308 F.2d 1, 13; *Martel Mills Corp. v. N.L.R.B.* (4th Cir. 1940), 114 F.2d 624, 632; *American Freightways, Inc.* (1959), 124 N.L.R.B. 146, 154.

From the foregoing the conclusion compellingly emerges that even resolving all conflicts in testimony in the Board's favor, the evidence lends no substantial support to the Board's pretext theory, but in fact shows that the discharge was lawful. This conclusion is reinforced by the evidence which bears on seniority, which will be considered next.

C. The Board's Position on Seniority Is Not Supported by Substantial Evidence.

Respondent's position has consistently been that Wetherill was discharged on Walker's return because Wetherill was the stage technician with the least seniority. The trial

examiner devoted the bulk of his discussion of the discharge to this issue (R. 41-45); the Board relegates it to the very end of its brief (Brief 49-53). However, the discussion of the examiner and the argument of the Board share a striking characteristic: neither of them tells us who, in their view *was* the man with the least seniority. In fact, the trial examiner did not even make a finding that Wetherill was not the low man.[22] This Court is entitled to more help than that. The following discussion will show that respondent in good faith discharged the man whom it reasonably determined to have the least seniority. We regret that the Board's approach has made extensive analysis of this issue necessary.

1. WHO DID WHAT WHEN AND WAS SENIOR TO WHOM?

In the Board's view, which we here accept for the sake of discussion, the seniority go-round involves three men: Wetherill, Jordan and McNerthney. There is little dispute about the jobs of the three or about the dates on which they were hired and assumed various functions. To aid review, we have prepared the following summary of the employment history of the three men with respondent. In order to minimize controversy, the summary is based on the trial examiner's decision (R. 41-42):

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22. The most the trial examiner would finally say is that "a tenable basis exists for concluding that the job of sound console operator was actually in the Entertainment Department, and, since Respondent contends that it applied departmental seniority in making its decision, Wetherill should not have been discharged" (R. 45). The examiner precedes this by commenting that "Respondent did not maintain such a rigid separation as it contended at the hearing" and that, for unspecified reasons, "the functions of the sound console operator . . . were more directly related to those of the stage crew than those of the Sound Department" (R. 44).

To talk in terms of "tenable basis . . . not such a rigid separation . . . more directly related . . ." is hardly the precision needed to aid this Court in its reviewing function. As will be seen below, such tentativeness is rather induced by stubborn facts that will not go away.

	Wetherill	Jordan	McNerthney
Sept. or Oct. 1960		Hired as waiter	
May 1961		Leaves for summer	
October 1961		Hired as clerk	
May 14, 1962			Hired as sound maintenance man. Preceded Wetherill as sound console operator.
Aug. 30, 1962	Hired as sound console operator		
Nov. 27, 1962		Becomes apprentice stage technician	
Jan. 1963		Becomes stage technician	
May 1963	Sick		
May 31, 1963	Becomes stage technician		
Sept. 1, 1963	Discharged		

Several matters become clear from the foregoing chart as to who had the least seniority. As between Wetherill and Jordan:

(a) Wetherill was junior in employment to Jordan.

(b) Wetherill was junior as a stage technician to Jordan.

Respondent's position is that seniority as a stage technician controls, because seniority was on a departmental basis and the stage crew was part of the entertainment department while the sound console operator was in the sound department. The only way in which Wetherill's seniority could be greater than Jordan's is by computing Wetherill's seniority from the time of his employment as a sound console operator while computing Jordan's from the time Jordan became a stage technician. This is the Board's rather curious argument; it will be discussed more fully below.

As between Wetherill and McNerthney:

(a) Wetherill was junior in employment to McNerthney.

(b) McNerthney was not at any time a stage technician (e.g. Tr. 716). He is irrelevant to the issue: his discharge

would obviously not solve the problem of Walker, the returning veteran who *was* a stage technician. Nor was McNerthney at any time in the entertainment department of which the stage crew was a part.

Concerning McNerthney, it is noteworthy that on the Board's own theory he had seniority over Wetherill. If, for the sake of argument, the sound department is regarded as part of the entertainment department, McNerthney was senior because he preceded Wetherill as sound console operator, as the trial examiner found (R. 42). To avoid this uncomfortable effect of its theory, the Board abandons it. The Board's argument as to McNerthney seems to be that he became a part of the Entertainment Department in June 1963 and had, accordingly, less seniority in that department than Wetherill (Brief 53). Even on the Board's new theory, its conclusion is unsupported. The Board claims that his time slips were signed by supervisors in the entertainment department; the testimony is that supervisors in one department occasionally signed slips for men in other departments and that McNerthney was never in the entertainment department, although he had a wistful longing to be in it (Tr. 412 ff., 633). The trial examiner did not find that McNerthney was ever a member of that department.

2. THE SOUND CONSOLE OPERATOR WAS NOT PART OF THE ENTERTAINMENT DEPARTMENT.

The Board's brief begins with an erroneous statement of fact, minor perhaps, but symptomatic of its confusion. The Board says that the sound console was "located above the stage in the South Shore Room" (Brief 17, note 7). It was not above the stage, but on the opposite side of the room from it (Tr. 332). In the same footnote the Board says that "(a)n intercom system is used to allow the producer and stage manager to direct and instruct the operation of the

sound console during the performances themselves." This is a more dangerous misstatement of the record to the extent that it implies that the producer or stage manager supervised the sound console operator. The trial examiner found no such supervision. The testimony of Wetherill was that some of the supervisors in the entertainment department a times told Wetherill that the sound was too high or too low, and that others as well—entertainers, their managers and their relatives—gave him instructions as to the volume of the sound (Tr. 629-631, 937-938). He complained that everyone gave him orders on the sound console (Tr. 943). But, concededly, none of the supervisors of the entertainment department gave him instructions or directions on the technical aspect of the sound console (Tr. 937). The only person who did so was Swartz, the sound engineer, who had hired him and assigned him to his duties (Tr. 935-937).

An abundance of testimony established that the sound console was, and is, in the sound department under the supervision of the manager of construction and maintenance—a situation which existed prior, during and after Wetherill's employment (Resp. Ex. 4, 13; Tr. 329-331, 519-521). The entertainment department operated under a vice president separately from the sound department. The operator of the sound console was never classified as part of the entertainment department (Tr. 333, 578, 591, 704, 780).

The testimony on which the Board relies (Brief 50-51) does not establish the opposite and the Board's recital of it is something less than accurate. Thus, the Board cites Wetherill's self-serving statement that Lein, the stage manager, told him that the entertainment department had taken over the sound console—a "fact" on which not even the trial examiner relied. The Board leaves unmentioned and

unexplained Lein's lucid testimony that Wetherill, as a sound operator, was never under his supervision (Tr. 591, 604-605), that the sound console had never been taken over by the entertainment department (Tr. 591), that the sound department had not been abolished (Tr. 604), that the only instructions the sound operator got from entertainment personnel dealt with such things as the volume of sound, that such instructions also came from entertainers, their managers and relatives (Tr. 618-620, 630, 631, 633) and that other personnel, such as wardrobe ladies, sometimes got instructions from people in the entertainment department, although they are not in that department (Tr. 633).

Lein's testimony is particularly valuable: he was no longer employed by respondent when he testified (Tr. 588) and he was a member in good standing of the I.A.T.S.E. throughout his employment by respondent and thereafter (Tr. 589-590).

The Board argues as relevant that some of Wetherill's time slips were signed by entertainment department supervisors. Yet, the testimony was undisputed that in respondent's operations the practice was for supervisors to sign an employee's slip even though he was not in the department of that supervisor (Tr. 412 ff., 633). The Board also refers to Vogt's testimony that Swartz told him in October 1963—several weeks *after* Wetherill's discharge—that there was no more sound department. The Board omits Vogt's explicit testimony that the sound department was never abolished (Tr. 698) and that operating the sound console was never part of the stage crew's job (Tr. 697).

In a similar vein, the Board says that "the record shows that the Entertainment Department exercised responsibility over the operation of the sound console" (Brief 51). What the record, including the parts referred to by the Board,

shows is that entertainment department personnel and others gave instructions only on sound volume during performances. It is significant (and again not mentioned by the Board) that this state of affairs existed even when, according to Wetherill, the console was a part of the sound department under Swartz's supervision (Tr. 937). Wetherill testified (Tr. 937-938):

"Q. During that same period that Mr. Swartz was your supervisor did Mr. Vincent tell you about the sound console, the volume, as to whether it was too high or too low or did one of the performers tell you whether it was too high or too low?

A. He did.

Q. And Mr. Barkow did the same?

A. Yes.

Q. And Mr. Lein did the same?

A. Yes.

Q. Did Mr. Vinent, Mr. Barkow or Mr. Lein give you instructions or directions on the technical aspects of the sound console?

A. No.

Q. Now, after you went into the entertainment, as you claim, or the stage department, as you put it, in November sometime of 1962, you still got the same kind of instructions from Mr. Vincent, as you call it, instructions or directions from Mr. Vincent, Mr. Barkow and Mr. Lein, right?

A. Yes.

Q. And the entertainer also gave you those same instructions and directions?

A. Yes.

Q. And the entertainer's agent?

A. Yes.

Q. And even relatives of the entertainers, right?

A. Right.

Q. And you had that same situation with respect to the entertainer's agents, relatives and so forth and

the entertainers themselves before you went on the stage department, as you claim, isn't that right?

A. Yes."

3. RESPONDENT APPLIED SENIORITY PRACTICALLY AND IN GOOD FAITH.

All the discussion about the relation of the sound console operator to the entertainment department should not obscure the underlying question nor the practical choices confronting respondent. The question is whether respondent discriminatorily discharged Wetherill.

The situation respondent faced was the return of a stage technician whom it was concededly required to reemploy. Respondent determined that it could not absorb another stage technician, a determination which, as previously shown, was reasonable.[23] Accordingly, respondent would have to let a stage hand go to make room for Walker. Whom should it let go? McNerthney who was not a stage technician at all? How would that solve the problem? Jordan, who not only had been a stage hand longer than Wetherill, but had been employed longer by respondent?

The obvious and fair choice was to let go the least senior stage technician. There is no dispute that this was Wetherill. Respondent made this choice, in a practical and common sense application of seniority. The Board's argument is a labored effort to turn a sensible decision into a discriminatory discharge—a kind of alchemy in reverse.

To summarize: aside from the usual claims that respondent knew of Wetherill's union activities and was hostile toward the union, the Board's major contentions are that respondent "cancelled" a crew increase and unreasonably "hastened" Walker's return. As discussed above, these two

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23. Section II B 3 of this brief, *supra*. As noted by the examiner this decision originated with Vincent (R. 41). There is no suggestion that Vincent at that time even knew that Wetherill was active in the union.

contentions are wholly groundless. In addition, respondent's choice among the three men at a minimum indicates that respondent made a reasonable choice. The Board's approach would make any choice unreasonable. Had McNerthney been discharged, the Board could have argued—with more logic—that to let go a man who was not even a stage hand in order to make room for a returning stage hand was a highly suspicious decision. And had Jordan been let go instead, it could be maintained that it was "remarkable" or "singular" (in the trial examiner's favorite words) to choose him over Wetherill in light of the fact that he had been a stage technician more than twice as long as Wetherill.[24] In short, suspicion might lead one to question any of the possible applications of seniority, but the application respondent in fact made is the most sensible it could have made.

D. In Light of Established Legal Principles the Board's Conclusion Cannot Stand.

We embark upon a restatement of the basic principles governing discharge cases and their judicial review with some reluctance because of their familiarity. We feel that such a restatement will provide a useful perspective for the present case and elucidate the insubstantiality of the Board's position.

1. THE BOARD FAILED TO ESTABLISH THE KEY ELEMENTS OF ITS CLAIM.

In discharge cases it is settled not only that the burden of proof is on the Board, but that it must establish three elements: (a) knowledge by the employer that the em-

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24. At the time of his discharge Wetherill had been a stage technician exactly three months; Jordan over seven months and longer than that if his apprenticeship is counted. Chart, p. 24, *supra;* R. 41.

ployee was engaged in protected activity; (b) a discharge because he had engaged in such activity; (c) that the discharge had the effect of encouraging or discouraging membership in a labor organization. This Court said in *N.L.R.B. v. Sebastopol Apple Growers Union, supra,* 269 F.2d at 711.

> "This Court discussed the governing principles in determining whether discharges are discriminatory in N.L.R.B. v. Kaiser Aluminum & Chemical Corp., 9 Cir., 217 F.2d 366, at page 368:
>
> > 'Discrimination relates to the state of mind of the employer. 'The relevance of the motivation of the employer in such discrimination has been consistently recognized * * *.' The General Counsel had the burden of the issue. Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, (2) to show that the employee was discharged because he had engaged in a protected activity, and (3) to show that the discharge had the effect of encouraging or discouraging membership in a labor organization. Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based. Unless there is reasonable basis in the record for making of the three essential findings, the employer who is permitted to discharge 'for any other than union activity or agitation for collective bargaining with employees' need not justify or excuse his action.'"

Similarly, in *N.L.R.B. v. Ford Radio & Mica Corp.* (2nd Cir. 1958), 258 F.2d 457, 461, the court said:

> "The burden is upon the General Counsel for the Board to show that the employer knew the employees were engaging in protected concerted activities and that

they were discharged for engaging in such activities. N.L.R.B. v. Kaiser Aluminum & Chemical Corp, 9 Cir. 1954, 217 F.2d 366. In addition the General Counsel must show in the case of a section 8 (a)(3) violation as opposed to only a section 8 (a)(1) violation that the discharges tended to discourage or encourage membership in a labor organization. N.L.R.B. v. J. I. Case, 8 Cir., 1952, 198 F.2d 919."

Only the first of these three elements has been established here: There was no dispute that respondent knew of Wetherill's union sympathies. To establish the second element the Board attempts to show that respondent cancelled a planned increase in the size of the stage crew and advanced Walker's return by four days in order to have a pretext for the discharge. As previously seen, this attempt miscarries since in lieu of evidence and in the teeth of a wealth of evidence to the contrary, it is based on suspicion and on arguments as to what the trial examiner would have done if he were a supervisor.

As to the third element—proof that the discharge tended to discourage or encourage union membership—the record contains no evidence, and the Board refers to none, which establishes its existence. Thus, on the two disputed elements which the Board has to prove, the Board substitutes arguments for evidence on one and ignores the other.

2. THE BOARD FAILED TO CONSIDER EVIDENCE FAVORABLE TO RESPONDENT IN LIGHT OF ESTABLISHED LEGAL PRINCIPLES.

(a) *Effect of retaining other union members.* It is of obvious significance that other employees active in the union retained their jobs (Section II B 1 of this Brief, *supra*). This indicates that Wetherill was not singled out because of his union activities and courts have attached weight to this

fact.[25] Closely related is the fact that the record shows no discrimination in hiring and firing practices between union and non-union adherents. This also is ignored by the Board. Pertinent here is the court's comment in *N.L.R.B. v. Murray Ohio Mfg. Co.* (6th Cir. 1964), 326 F.2d 509, 515:

> "'We do not think that the General Counsel may isolate the facts on which he draws his inferences from the abundant evidence which should be examined in its totality, if the truth is to be found, and yet claim he had met his burden of proof. We believe the dissenting members of the Board appropriately observed:
>
> "Discrimination in our view, presupposes or implies disparate treatment. Without an adequate background, against which the treatment accorded the complainants may be compared and contrasted, disparate treatment cannot be shown to exist."'
>
> The Board in the instant case does not even contend that it has provided such 'an adequate background' against which treatment may be compared."

(b) *Timing.* It will be recalled that Wetherill was replaced by Walker on September 1, although Walker was ready to go back to work prior to that time. Thus, respondent could have discharged Wetherill earlier had it been

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25. E.g. *N.L.R.B. v. Sun Co. of San Bern.* (9th Cir. 1954), 215 F.2d, 379, 382; *N.L.R.B. v. Arthur Winer, Inc.* (7th Cir. 1952), 194 F.2d 370, 374; *N.L.R.B. v. Centennial Cotton Gin Co.* (5th Cir. 1952), 193 F.2d 502, 504; *John S. Barnes Corp. v. N.L.R.B.* (7th Cir. 1951), 190 F.2d 127. In *N.L.R.B. v. Sun Co. of San Bern., supra,* this Court said:

> "We are impressed with the fact that of the fourteen employees who joined the union, Millins and Bennett only were discharged."

Among recent Board decisions considering this factor in concluding that there was no discrimination are *Weisman Novelty Company* (1962), 135 N.L.R.B. 173, 178, and *Charlotte Union Bus Station, Inc.* (1962), 135 N.L.R.B. 228, 235. Here the Board ignores this element.

looking for a pretext to do so. As previously noted, under the applicable decisions this is a highly relevant factor militating against the Board's pretext theory (Section II B 4 of this brief, *supra*).

3. THE BOARD IGNORES THE APPLICABLE STANDARDS OF JUDICIAL REVIEW.

We have already noted some of the extreme lengths to which the Board went to ignore evidence that runs counter to its conclusion and to substitute speculation for fact. The Board's brief reflects this approach and it is not one that either lends weight to its findings or simplifies the task of this Court in exercising its reviewing functions.

The controlling case on the scope of review is, of course, *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U.S. 474, 71 S. Ct. 456, where the Supreme Court discussed the legislative history of the Act's review provisions and called attention to public and congressional dissatisfaction with the "abdication" with which some courts granted enforcement of Board orders under the Wagner Act which had provided that the Board's findings were conclusive if supported by evidence. The Court pointed out that the present standard broadens the review responsibilities of courts, although no rigid formula was established. The Court did say (340 U.S. at 490, 71 S. Ct. at 466)

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to

> enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

In *N.L.R.B. v. Sebastopol Apple Growers Union, supra,* 269 F.2d at 713, this Court said concisely:[26]

> "The scope of review of this Court in a case of this type was discussed in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S. Ct. 456, 464, 95 L. Ed. 456, 464. The Court there said that the Taft-Hartley Act 'definitely precludes' courts from determining 'the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence from which conflicting inferences could be drawn.' "

Accordingly, since *Universal Camera,* courts take the view that "it is our duty to consider not only evidence tending to support the Board's findings but also evidence conflicting therewith"[27] and that "(T)he entire record must

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26. An excellent and more extensive statement as to the scope of review is found in the subsequent decision of this Court in *N.L.R.B. v. Isis Plumbing & Heating Co.* (9th Cir. 1963), 322 F.2d 913, 920-921.

27. *N.L.R.B. v. Gala-Mo Arts, Inc.* (8th Cir., 1956), 232 F.2d 102, 105; *N.L.R.B. v. Isis Heating & Plumbing Co.* (9th Cir. 1963), 322 F.2d 913, 921; *N.L.R.B. v. Sebastopol Apple Growers Union supra; N.L.R.B. v. Threads, Inc., supra,* 308 F.2d at 7; *N.L.R.B. v. Englander Company* (9th Cir. 1958), 260 F.2d 67, 70.

be viewed in context with the established principle of law that an employer may discharge an employee for good cause, or bad cause, or no cause at all, unless the real motivating purpose is to do that which Sec. 8(a)(3) of the Act forbids."[28]

While there is no formula for ascertaining substantial evidence, certain principles have developed in addition to the one of considering the evidence on both sides:

(a) Substantial evidence must be more than suspicion.[29] Typical of suspicion is the Board's sinister inference from the recall of Walker on September 1.

(b) While the Board is entitled to draw legitimate inferences from the testimony, the pyramiding of inferences does not constitute substantial evidence: the Board's conclusions "should not rest upon an inference which itself rests on an inference." *Salinas Valley Broadcasting Corp. v. N.L.R.B.* (9th Cir. 1964), 334 F.2d 604, 613; *N.L.R.B. v. Miami Coca-Cola Bottling Co.* (5th Cir. 1955), 222 F.2d 341, 344. Here the Board in its "crew increase" argument begins with testimony that in the event the Wage-Hour law applied to the stage crew, respondent might ultimately have to hire additional stagehands. From this, the Board infers that respondent definitely planned such an increase,

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28. *N.L.R.B. v. Isis Plumbing & Heating Co. supra*, 322 F.2d at 922, and cases there cited. In *N.L.R.B. v. West Point Mfg. Co.*, (5th Cir. 1957), 245 F.2d 783, 786, the court said:

> "In each case it must be established whether the legal or the illegal reason for discharge was the actually motivating one, and if evidence of both is present we must ascertain whether the evidence is at least as reasonably susceptible of the inference of illegal discharge drawn by the Board as it is of the inference of legal discharge."

29. *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U.S. 474, 477; 71 S.Ct. 456, 459; *N.L.R.B. v. Winston Brothers Co.* (9th Cir. 1963), 317 F.2d 771, 775; *Riggs Distler & Co. v. N.L.R.B.* (4th Cir. Dec. 1963), 55 LRRM 2145, 2149.

that respondent "abruptly" cancelled it and that the alleged cancellation was for an unlawful motive.

(c) The Board falls into the classic error of purporting to evaluate respondent's actions in terms of reasonableness. It asks, for instance, "what legitimate business considerations" influenced respondent's alleged decision not to increase the crew size (Brief 47-48)—even though there was no such decision. It regards as unreasonable the recall of Walker four days ahead of time; it feels that if it were management it would not have discharged Wetherill just then because in the Board's view the stage crew was busy. It views as unreasonable, too, management's application of seniority. The fallacy of this approach has been repeatedly exposed. For example, in *N.L.R.B. v. Sebastopol Apple Growers Union* (9th Cir. 1959), 269 F.2d 705, 712-713, this Court said:

> "The Trial Examiner might have operated the cannery differently. But the respondent had the right to determine for itself how its business was to be conducted. Management may make wise decisions or stupid ones, and it is no concern of the Board unless they are unlawfully motivated."

The Court went on to say:

> "Apparently the Trial Examiner in this case fell into the same error as was discussed in N.L.R.B. v. McGahey, 5 Cir., 1956, 233 F.2d 406, 412, where the Court said:
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> > 'The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if the lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the em-

ployer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific definite qualification: it may not discharge when the real motivating purpose is to do that which Sec. 8(a)(3) forbids. N.L.R.B. v. Nabors, supra [5 Cir., 196 F.2d 272]; N.L.R.B. v. National Paper Co., supra [5 Cir., 216 F.2d 859]; N.L.R.B. v. Blue Bell, Inc., supra [5 Cir., 219 F.2d 796]; N.L.R.B. v. C. & J. Camp., Inc., supra [5 Cir., 216 F.2d 113.]'"

Among many other such expressions by our courts we refer to the recent ones in *Steel Industries, Inc. v. N.L.R.B.* (7th Cir. Nos. 1963), 325 F.2d 173, 176-177,[30] *N.L.R.B. v.*

30. "The rule has often been announced that an employer has the right to discharge an employee for good reason, bad reason or no reason, absent discrimination. We think the employer has the same right in assigning its employees. Moreover, the contention that the Company might have recalled from the night shift one of the three employees previously transferred there in order to make a place on that shift for White, or that it might have permitted White to remain on the night shift rather than transfer Brady to that shift, is beside the point. It might be, if the Trial Examiner had occupied the shoes of management, that he would have done so in order to accommodate both White and Brady. Even so, no inference unfavorable to the Company can be deduced from these circumstances. The shift assignments were matters peculiarly within the prerogative of management, and its reasonable business decision is of no legitimate concern either of the Board or the Courts."

The Court goes on to quote from *McGahey* in the same manner in *Sebastopol Apple Growers Union, supra.*

Murray Ohio Mfg. Co. (6th Cir. 1964), 326 F.2d 509, 514,[31] *Raytheon Company v. N.L.R.B.* (1st Cir. 1964), 326 F.2d 471, 475[32] and *Portable Electric Tools, Inc. v. N.L.R.B.* (7th Cir. 1962), 309 F.2d 423, 426.

III.

THE BOARD'S CONCLUSIONS THAT RESPONDENT VIOLATED SECTION 8(a)(1) ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The trial examiner's "concluding findings regarding interrogation and statements by supervisors" are found at R. 36-37. The Court's task in reviewing this barrage of claimed 8(a)(1) violations is not made easier by the order of the Board's brief which is not keyed to the examiner's findings. Nor is it aided by the examiner's failure to refer specifically to the various charges of the complaint and expressly dispose of them. To facilitate review, we will discuss the alleged violations in the order of the examiner's conclusions.

A. Brigham.

The examiner found that "Brigham threatened 'to get even' with the stage crew; warned that Respondent would withdraw benefits from the employees, and would reduce the size of the crew if it were obliged to sign a contract with the Union" (R. 36). Let us consider the evidence bearing on these three findings.

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31. "However faulty the employer's methods (and we do not here intimate that they were faulty) they will not convict it of violation of the Act unless such methods were purposely used to discriminate and to discourage union membership."

32. "In stating that there was no credible evidence tending to show that the company reasonably believed that Reikard and Fish had been guilty the examiner, again, misstated the issue. The question, of course, was what the employer believed and not whether that belief was reasonable."

1. ALLEGED THREATS TO GET EVEN AND TO WITHDRAW BENEFITS.

Brigham allegedly made these threats on October 15, 1963, the day *after* the election (Complaint, par. VI (K); R. 6, 22-23). The examiner relied on testimony that "Brigham approached a group of the stage crew who were seated at a table in the employees' cafeteria. Pointing to the food on the table, Brigham remarked irritably, 'this is one of the things we will be bargaining for.'" In the Board's view, these words were a threat to withdraw benefits! Later in this conversation Brigham supposedly threatened to get even with the members of the group (R. 22).

The examiner says that "Brigham admitted the encounter in the cafeteria substantially as described" (R. 22, lines 39-40, 53-55). Brigham did nothing of the sort. He denied making any threats to get even or any other threats. He testified that he approached the group at the table and told them that he was hurt because they had "bamboozled" him, that "we had tried to get the facts across so they could make a just decision, that the outcome was definitive and now in the next six or nine months we would all find out what the facts were, especially that we had been trying to post and tell them about" (Tr. 375-379).

Just why the examiner regards this forthright testimony of Brigham's as admitting or corroborating the alleged threats is not clear. What is, however, clear is that the examiner used his so-called corroboration to discount the fact that Jordan, who was supposedly part of the Group to whom Brigham spoke, and who testified on behalf of the General Counsel, was not questioned about this incident and the further fact that the General Counsel failed to call others of the group (R. 22, Note 14).

Thus, the present status of the matter is that since there was patently no corroboration by Brigham of the facts the

examiner purported to find, the unfavorable inference resulting from General Counsel's failure to call others who were part of the group remains undispelled.

Further, assuming *arguendo* that Brigham made the statements attributed to him, the following considerations are pertinent:

(a) Pointing "irritably" to food on the table and saying "this is one of the things we will be bargaining for," is clearly no threat to withdraw benefits.

(b) The trial examnier, in appraising this incident, failed to consider that Brigham learned from respondent's Vice President Andreotti that one of the stage crew (Murray, who was not persent at the conversation in the cafeteria) had told Andreotti that Brigham had threatened them. In response to this Brigham sought out the crew the following night and told them that they had misunderstood him, that he had made no threats, intended no threats and that if they understood him to have made threats, he wanted to apologize. (Tr. 379-380, and see testimony of General Counsel's witness Lovelady, Tr. 95-96.) This is hardly the conduct of a man—or of a company—engaged in a course of threatening employees.

Whatever one may think of stretching an irritable post-election statement into a threat, any threat was plainly dissipated by Brigham's statement on the following night. And, of course, there is no claim that this threat, or any others attributed to respondent, were ever translated into action—a fact which, while not determinative, is relevant.

2. ALLEGED THREAT TO REDUCE SIZE OF CREW.

The complaint alleges two such threats by Brigham. The first was supposedly made on September 12, (Complaint, par. VI(j), R. 6). We have carefully examined the record,

the Board's brief and the examiner's recital of events (R. 20). We find nothing in any of them that refers to such a threat.

The second instance supposedly occurred on October 17 (Complaint, par. VI(m), R. 6, 25 lines 24-28). The only evidence bearing on this allegation relates to the conversation on the night in the cafeteria when Brigham apologized. Although Lovelady testified that four others were present on that occasion, the General Counsel, while calling three of the four (Ponts, Rux and Jordan), did not interrogate them concerning this incident. Lovelady testified that Jordan interrupted Brigham with a statement "You threatened us" and that Brigham said "If I did not then, I do it" and that "within six to eight months this crew will be reduced thirty to fifty percent" (Tr. 96). Why, if the alleged statement was in answer to Jordan's comment, did the General Counsel not examine Jordan concerning it? The logical inference is that Jordan would not have supported Lovelady's testimony.[33]

Brigham testified that he made a trip from Reno to the Lake and went to the same place where he had spoken to the group on the previous occasion and asked whether any of them "had been around the round table the preceding night." He said he got no clear affirmative response and then told them "I have been told I cursed you and threatened you. I have a reputation for not cursing and I don't believe I did. I have been in Industrial Relations as an employee representative for fifteen years and in the union before that and I know better than to threaten. If I did either threaten or curse you in your mind, I want to apologize because I don't believe it necessary to threaten and

33. See authorities cited in Board brief, p. 51, note 21.

I wouldn't want to curse, so if I did either I want to apologize" (Tr. 380).

An examination of the testimony and the setting of the incident renders it implausible that Brigham made the statement attributed to him. Why would he come to apologize—as even the examiner admits he did (R. 25, lines 12-22)—and at the same time make a threat?

Illustrative of the trial examiner's approach to the allegations concerning Brigham and to the case as a whole, is the examiner's discussion in footnote 17 on page 25 of his decision. In this footnote, after referring to Brigham's educational (B.S., M.A., M.Ed., and Ph.D. in English) and union background (former state secretary of the American Federation of Teachers, AFL-CIO), the examiner criticizes his testimony, without, however, referring to any specific testimony, other than his choice of language. Almost all of his language, however, was attributed to Brigham by others and denied by him. Common sense would lead one to doubt that a man of Brigham's background would use such language, and this doubt is reinforced by his testimony. Instead the trial examiner accepts General Counsel's version of what Brigham said, concludes that these statements measure Brigham's resentment toward the union, and concludes from this that no credence is to be given to his denials—a chain of bootstrap reasoning that is remarkable for its classic circuitousness.

B. Vincent.

In his conclusions regarding statements attributed to Vincent, the examiner again fails to tie these conclusions to charges in the complaint (R. 36, lines 32-44). He reaches conclusions about matters not charged and fails to reach conclusions about at least one matter which was charged.

Thus, his first three conclusions, dealing with alleged statements to Lovelady and Walker, are not related to any charge, aside from being supported by scant evidence. Let us examine what Vincent *was* charged with.

1. Par. VI (f) (R. 6) of the complaint charges him with coercive interrogation of employees on September 9. The examiner's conclusions, however, only find interrogation *after* the election which took place on October 14 (R. 25, lines 32-44, esp. lines 37-41). Nor does the recital of events in the decision refer to any occasion on or around September 9, involving Vincent (R. 17). Nor is there any evidence of such interrogation. Presumably the examiner finds this charge unsupported, although it would make the task of the parties and Board easier if he had said so. An examiner can hardly be regarded as a model of impartiality who makes all rulings against a party express but rules in favor of that party only by implication.

2. Par. VI(n) (R. 6) charges coercive interrogation by Vincent on October 17. According to Lovelady and Walker, Vincent requested them to come to his office where he talked with them about what had happened to bring about the election result. This was about three evenings after the election. Respondent was then in the process of preparing objections to the election which were subsequently filed. In the course of his discussion with Lovelady and Walker, Vincent asked them about promises which had been made by the Union. Among the objections to the election were promises and threats by the Union to induce the employees to vote for the Union (Respd's Exh. 11). Basically all that Vincent was asking was where management had gone wrong (Tr. 102-105, 128-129, 193-194, 207-208, 562-568). There is nothing coercive about such questioning nor is such questioning proscribed by the Act.

3. In paragraph VI(o) (R. 7), it is alleged that on or about October 17, 1963, Vincent informed employees that their opportunities for advancement were terminated because of their union activity. This allegation is apparently a refinement of the discussion which took place between Lovelady, Walker and Vincent. Walker testified that Vincent had made some reference about his chances with respect to advancement in Harrah's organization. Vincent denied that he said anything of the kind (Tr. 571-573). A reading of Vincent's testimony when compared with Walker's must compel the conclusion that the truth lies with Vincent. This is made evident by the testimony of Walker, as we shall show when we treat with the next allegation in the complaint concerning Vincent.

4. In paragraph VI(p) (R. 7), it is alleged that on or about October 17, 1963, Vincent solicited employees to by-pass the Union as their collective bargaining representative and deal directly with management. Nowhere in Lovelady's testimony concerning his conversation on the same evening with Vincent is there any reference to Vincent having asked him to by-pass the Union and deal directly with management. Walker testified that Vincent said the stage crew could come to him in mass or a group could be sent to him to iron out their differences. Lovelady, who was better known to Vincent than Walker (the latter having only a few weeks before returned to work for Harrah's after being in the army for almost two years), would have logically been the one to whom Vincent would have confided such thoughts if he had uttered them. Lovelady, it will be remembered, at times engaged in supervisory duties (Tr. 595). Walker was not known to Vincent before his return from the army (Tr. 559). On cross-examination, Walker admitted that he was not positive as to what Vincent did say in that

respect. He admitted that what Vincent may have said to him was merely that he was sorry the crew did not come to him with their problems before they sought outside help (Tr. 208). He also admitted on cross-examination that when Vincent used the term "negotiate" in the same context, he understood Vincent was referring to negotiations for a union contract with the IATSE (Tr. 209). How the trial examiner can translate such evidence into finding of interference is more than a dozen Philadelphia lawyers could explain.

C. Barkow.

Again the examiner follows his puzzling pattern of not finding on all charges and finding on some matters not charged. For the sake of clarity we will compare the charges and the findings:

Par.	Complaint Charge	Findings
VI(a)	Coercive interrogation, August 9.	Not sustained (R. 16, lines 11-28)
VI(e)	Threatened job loss, September 9.	Apparently found by the trial examiner.
VI(g)	Coercive interrogation, September 10.	Apparently found by the trial examiner.
VI(h)	Threatened work reduction, September 10.	None
None		Told men they could still vote against union.
None		Mentioned union qualifying tests for membership.

Let us consider the charges and findings in order:

1. ALLEGED COERCIVE INTERROGATION ON AUGUST 9.

Although the examiner does not refer to this matter in his conclusions, elsewhere in his decision he expressly finds that there was no interference, restraint or coercion in any

remark Barkow may have made on this occasion (R. 16, lines 11-28).

2. ALLEGED THREAT OF JOB LOSS ON SEPTEMBER 9.

With regard to this charge the trial examiner's concluding finding in full is: "Producer Barkow made statements to Rux before the election regarding the reduction of the crew and other unfavorable consequences." (R. 36, lines 44-46) This is patently insufficient as a finding of interference, restraint or coercion. Nor does the evidence support such a finding. According to General Counsel's witness Rux, there was a conversation with Barkow on September 9 in the employees' cafeteria. Only two persons were present and these were Barkow and Rux. It is clear from Rux's testimony, that what Barkow had reference to was what the situation might be under an IATSE contract. The terms of the type of contract which the IATSE generally had in the entertainment industry were made known by management to the employees during the election campaign. The method of hiring for the stage under such contract, the dispatching of men from the Union hiring hall, the erratic type of employment under an IATSE contract and the smaller crew which is not only provided for under such contract, but the statement made to respondent in the past by a representative of a Local of the IATSE that if respondent recognized the Union it would not have to have as large a stage crew, were all made known to the employees. This is what Barkow was discussing with Rux and Rux so understood it (Tr. 300-301, 307-309).

3. ALLEGED COERCIVE INTERROGATION ON SEPTEMBER 10.

The related finding apparently is that Barkow interrogated Walker, an incident which, if it took place at all, occurred on September 13 (R. 19, lines 1-11). Accepting the

trial examiner's version of the incident for the sake of discussion, the conversation between the two men is patently not "coercive interrogation."

4. ALLEGED THREAT OF WORK REDUCTION ON SEPTEMBER 10.

The examiner refers to only one occasion on which Barkow allegedly spoke of such a matter and this has already been discussed. Accordingly, this charge is not sustained, although the examiner does not expressly say so.

5. FINDINGS UNRELATED TO COMPLAINT.

The examiner's concluding findings that Barkow told the men they could still vote against the union and that he mentioned the requirement of qualifying tests for union membership are wholly untenable. First, they accuse Barkow of matters outside the complaint. Second, even assuming that such statements were made they are plainly not examples of interference, restraint or coercion. Rather these findings are examples of the examiner's gratuitous effort to aid General Counsel's case. They are relevant to the question of the examiner's partiality rather than to respondent's conduct.

With regard to the mentioning of qualifying tests for union membership, the examiner makes a particularly remarkable argument. He says (R. 35, lines 28-37):

> "Nor is Respondent aided by the fact that in furnishing employees with information on purported union requirements and practices, Respondent claimed to be relying on statements made by union representatives of another Local. Furthermore, the circumstance that Respondent may have honestly, but mistakenly, believed that the statements to its employees correctly expressed the prevailing union policies and practices, does not excuse Respondent from the consequences of its dissemination of misleading information. The traditional maxims, that ignorance of the law does not

> excuse, and that a person may reasonably be presumed to intend the natural and necessary consequences of his act, apply here."

The trial examiner's conclusion is unique. So is his defense of it by referring to "the traditional maxims, that ignorance of the law does not excuse, and that a person may reasonably be presumed to intend the natural and necessary consequences of his act." Resolution of legal issues by resort to maxims is at best a dubious procedure. It becomes even more dubious when the maxims are inapplicable. For here the trial examiner's own statement clearly shows that if there was a mistake it was one of fact, not law—a mistake, in his words, about "the prevailing union policies and practices." It is a novel doctrine indeed that an employer may not repeat statements made by union representatives without running the risk of being found guilty of an unfair labor practice if the statements turn out to be erroneous. This is the first instance of which we know where a union can turn the statements of its own representatives into a charge of an unfair labor practice against it.

The Board's arguments only emphasize the weakness of its position. Conceding for the sake of discussion that such statements by the employer must have "some reasonable basis" to be protected (Board brief 43), such a basis was clearly present here; the examiner's position was that no matter how reasonable the basis, the statements were unprotected if they turned out to be mistaken. Small wonder the Board's brief on this point ends with a plea, in a footnote, that the matter is one within the special competence of the Board (Brief 43, note 18). This does not excuse the Board from applying the "reasonable basis" rule it itself cites.

D. Lein.

The complaint makes three allegations against Lein (Pars. VI(d), (s) and (t), R. 6, 7). In order to keep this brief within reasonable length we will limit our discussion to these three and merely note that several of the trial examiner's "concluding findings" concerning Lein (R. 36, lines 52—R. 37, line 13 have no relation whatever to the allegations.

1. ALLEGED THREAT OF WORK FORCE REDUCTION ON SEPTEMBER 9.

The evidence presented by the General Counsel on this allegation was the testimony of Lovelady that Lein pointed out the stage crew would have less job security if the Union came in and that they would probably not all be kept on and "that they would work like any Union contract where they would have four major men." Lovelady went on to say that Lein said "the rest of the men would be brought in from the Union Hall" (Tr. 73-74, 76). On cross-examination, Lovelady made it clear that what Lein was referring to was the effect of an IATSE contract such as the Las Vegas contract (115-116, 134). How this could be construed as a threat to reduce the work force as a reprisal completely escapes us. (The charge is that "Lein threatened employees with a reduction in the work force as a reprisal for their union activity." Cplt. Par. VI (d), R. 6).

There was no threat, let alone a threat of reprisal. Lein referred to what could happen at Harrah's by virtue of the anticipated demands of IATSE. In this connection two points bear emphasis:

First: Under IATSE contracts a small crew is called for (Resp. Ex. 6).

Second: Management had a basis for pointing out what could happen under IATSE representation because it not only had the Las Vegas contract of this union, but also be-

cause there were supervisors familiar with working under an IATSE agreement and because the Sacramento local of IATSE had previously approached management with a request for recognition and had held out as bait that under IATSE respondent would not need as large a crew and could, in fact, reduce it by at least a third (Resp. Ex. 15).

2. ALLEGED ALTERATION OF WORKING CONDITIONS ON OCTOBER 20.

The evidence on this charge is that on October 20 Lovelady had heard that the stage crew were no longer to do any work in the Lounge. The only complaint which Lovelady had was the manner in which he obtained the information. Lovelady, who is a stage technician, apparently felt that management had not paid proper respect to his position and failed to inform him personally beforehand of any change with respect to the Lounge. Just why he felt that this honor was due him was never explained. It did not result in a reduction in compensation, nor in a reduction in the amount of work which was done by the stage crew. There was other work which was given to them. If anything, the move was an improvement for the stage crew. When they did work in the Lounge they would have to come in early in the morning. On those occasions and particularly when they were tearing down the old and setting up a new show, those who might be working the Lounge the next day would go with very little sleep (Tr. 107-109).

In answer to questions by the trial examiner, Lovelady testified the stage crew did not regard their duties in the Lounge as desirable, nor did they particularly want those duties. As mentioned, relieving them of such duties did not reduce the work week for them, nor did it result in any loss of compensation (Tr. 141-142, 149). They still worked the same number of hours and the same number of days (Tr. 149). They now were able to sleep longer (Tr. 150-151).

3. ALLEGED THREAT OF LOSS OF FRINGE BENEFITS ON OCTOBER 20.

The sole evidence on which the trial examiner relies in support of this allegation is the testimony of Lovelady that on the occasion when he complained about not having prior notice as to the change in the Lounge that Lein stated "there is more than $200.00 paid in annual holidays a year that you will no longer get." Lovelady testified that he (Lovelady) commented "these are negotiable points." He said that Lein replied "you are right, they are negotiable, however, these are Mr. Harrah's benefits and if Mr. Harrah doesn't wish to give them to you, you won't get them" (R. 28).

Lein testified he responded to a question by Lovelady by pointing out to him that the stage crew was receiving about $200.00 more per man annually in paid holidays than they would get under the usual IATSE contract. He mentioned that this was a negotiable subject (Tr. 598-599, 612-614).

At best Lovelady's testimony, if credited, demonstrates that Lein was pointing out that certain benefits which they were receiving, and which they had been receiving without the intercession of any union, would become the subject of negotiation. This is the law and Lein was only stating an industrial fact of life. In the course of collective bargaining it would be expected that fringe benefits such as holidays would be the subject of negotiation. The Board has held that in collective bargaining it is not encumbent upon an employer to give to the employees the same benefits which they had been enjoying. He has a right to bargain about those. This was all that Lein obviously was conveying to Lovelady. *Midwestern Instruments, Inc.* (1961), 133 NLRB No. 115, 48 LRRM 1793 at 1795; *Continental Bus System, Inc.* (1960), 128 NLRB 384, 46 LRRM 1308.

E. Vogt.

In paragraph VI(b) it is alleged that on or about August 19, 1963, Vogt threatened employees with a reduction in the work force as a reprisal for their union activity. Wetherill testified that about this time, which was about the time a copy of the Union's petition for an election had reached respondent, he approached Vogt near the A.C. board and told him that the reason he did not tell Vogt about the petition was because Vogt was too close to Lein and he couldn't trust him. Wetherill further testified that Vogt told him that he carried an IATSE card in his pocket and that he respected it. In the same conversation Vogt, according to Wetherill, said "you will never keep fourteen men working here if you go Union or have a contract." This was the sum total of the conversation with Vogt (Tr. 26-27). On cross-examination Wetherill's story with respect to what Vogt said was less dramatic than he attempted to make it on direct examination. Although sparring with counsel, he admitted Vogt had pointed out that under the IATSE contracts in other areas the crew was smaller than at Harrah's. And he further admitted that in the context of reference to the IATSE contracts, Vogt had said it was possible that under a union contract at Harrah's they could have a smaller crew (Tr. 52).

Vogt testified credibly that at no time did he threaten a reduction in the work force as a reprisal for union activity and that he at no time said Harrah's would reduce the stage crew as a reprisal for union activity. Being a member in long and good standing of the IATSE and having worked in various areas under their contracts, he was familiar with the terms of such contracts as to the size of the crew, as to the method of operation of that Union and its hiring hall procedure (Tr. 643-645, 655-657). All he did in dis-

cussing the situation with Wetherill or any other employee was to attempt to point out to them the facts. These facts related to the size of the crew and how stage crews are handled under IATSE contracts.

The trial examiner's discussion of this incident (R. 16, lines 38-45, R. 36, lines 52-56), as well as the Board's (Brief 4, 35), are noteworthy for making no reference to Vogt's testimony whatever. Plainly there was no threat of reprisal or any threat.

F. Sheeketski's (Alleged Interrogation of Karla Murray).

In paragraph VI(q), it is alleged that on October 17, 1963, Sheeketski coercively interrogated employees regarding the Union membership, activities and desires of other employees. The evidence did not disclose that "employees" were interrogated. There was only one employee to whom Sheeketski spoke and he did not coercively question her about union activities, membership and desires (whatever that may be) of other employees. The only employee he spoke to was Karla Murray, whose testimony left a great deal to be desired, at least from the standpoint of proving the allegations. Just what Sheeketski said to her which could be construed to constitute an interference within the meaning of section 8(a)(1) we are unable to comprehend. Sheeketski spoke to Karla Murray for one and one reason only. This was to obtain the facts to support objections to the election which the respondent was going to file and did file. He was told by Brigham that respondent contemplated filing objections to the election based upon promises and threats which had been made by union representatives to induce the stage crew to vote for the union. In order to support these objections it is necessary that the facts pertaining thereto be obtained and presented to the Board. In this connection, Brigham asked Sheeketski

to talk with one of the employees in his department, who was the wife of one of the stage technicians (Murray), for the purpose of determining just where it was that meetings were held by the Union with the stage crew at which such promises and threats were made (Tr. 428-430, 431-432, 819-821, 825, 836, 852-853, Respd's Exh. 11). Sheeketski did talk with her, he did make it clear to her that he was not threatening her (Tr. 252, 825). He explained to her the reason for wanting to talk with her (Tr. 822-823). He told her she was not required to answer any of his questions or to make any comments and that she was to feel free to leave anytime she wanted to do so (Tr. 822-825).

She agreed to stay (Tr. 822). He mentioned to her that he had information concerning meetings at union agent Wetherill's trailer at which Wetherill was supposed to have made certain promises to the stage crew (Tr. 823-825). There was no coercion of any nature. All he did was to point out that while the Union had promised members of the crew jobs in Las Vegas if they would vote for the union, since Mrs. Murray's husband was a member of the stage crew, if he were to take a job in Las Vegas she would have a difficult time getting a job there because very few women are hired as dealers by the Las Vegas casinos (Tr. 822-823). Mrs. Murray was employed as a dealer at Harrah's (Tr. 247). Rather than a threat of a reduction in the work force, it would appear that Sheeketski was pointing out to her the situation which prevailed in Las Vegas and which could be detrimental to her interests as contrasted with the fact that Harrah's did employ many women dealers.

All of the information which Sheeketski sought is permitted and has been held by the Board to be proper. It has been held by the Board that questioning of an employee for the purpose of a court or Board proceeding does not con-

stitute interference. *Maxam Dayton, Inc.* (1963), 142 NLRB 396, 53 LRRM 1035, and *May Department Stores Co.* (1946), 70 NLRB 96, 18 LRRM 1338.

Accepting, *arguendo,* the trial examiner's summary of this incident (R. 29-30), his conclusion that "Sheeketski's interrogation and remarks were reasonably calculated to persuade Murray, by playing on his wife's concern about her own job, as well as her husband's, to renounce the Union" (R. 32) is incredible. To reach it the examiner has to disregard all the testimony offered by respondent and substitute for the actual situation a fantasy of his own making.[34]

Why would respondent single out one man for pressure to renounce the union? If, as the examiner says (R. 20, lines 20-22), respondent regarded stagehand Murray as "one of the least enthusiastic union adherents and thus more susceptible to persuasion," why did respondent not seek to persuade him before the election—a task that presumably (if the trial examiner's reasoning is accepted) would have been easier?

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34. Illustrative of the fantasy engaged in by the trial examiner is his reference to Sheeketski's testimony concerning the difficulty he and Mrs. Murray had with their breathing after climbing the stairs on the way to the office where the interview occurred. He concludes (R. 30, lines 57-62):

> "Although Sheeketski (presumably a former athlete) testified that he, himself, had also been breathing heavily, it seems surprising that the walk to the office on the second floor could have accounted for Murray's heavy breathing. If it actually happened it seems more probably that it was due, as Sheeketski had implied earlier to Brigham, to her apprehension at the approaching interview."

The elevation at Stateline, Nevada, is 6280 feet (U. S. Geological Survey, Bijou Seven and a Half Minute Topographic Quadrangle Map). The writer of this brief who is a few years younger than the trial examiner and in good health has had difficulty with his breathing after climbing these same stairs. We would welcome a test by the trial examiner or anyone else the Board may designate, including young athletes of olympic caliber.

And, if the objective was to have Murray renounce the union, why—on the basis of Mrs. Murray's own testimony—was not one word of this breathed to her?

There is no evidence, let alone substantial evidence, to support such a conclusion. Nor is there any evidence of what the examiner calls a "tacit threat of loss of employment" to Mrs. Murray's husband (R. 37, lines 16-17). On Mrs. Murray's own testimony, Sheeketski said "that your husband could possibly be one of the men to go since he is lower in seniority." (R. 29, lines 47-48). That is no threat of reprisal for union activities. The statement referred to the realistic possibility of small crews under an IATSE contract; the reference to seniority is the exact opposite of a threat of reprisal. All Sheeketski was referring to was a truism under the IATSE agreements (Tr. 824-825, 836-837).

In this connection, the Board's recent decision in *Weber Shoe Co.* (March 1964), 146 NLRB 348, is of interest. There the Board held that the asserted threat in a superintendent's remark to an employee that he could continue, like one of the discharged employees, "going to the union and the labor board until you lose your job," was too ambiguous to constitute coercion. In the present case, the so-called "tacit threat" was vastly more ambiguous. The cases cited by the Board (Brief 40) did not involve situations similar to the present one; the Board cites these for general principles which, by their terms, apply only if intimidation or threats are present.

IV.

CONCLUSION

Respondent has shown initially that the Board's assertion of jurisdiction in this case is an unjustified departure from its standards. Here, as in the racetrack cases, the dis-

pute is essentially local in nature and occurs in an industry which is subject to extensive state regulation. While the Board may exercise discretion in the assertion of jurisdiction, the discretion is not unlimited. Its exercise becomes unlawful when, as here, considerations that are equally true of two industries are applied to one but not to the other. Men cannot govern their conduct by such vagaries.

Respondent next discussed in detail the claimed unlawful discharge. The Board's pretext theory is unsupported by the record and its conclusions cannot stand. Unsupported, too, are the alleged 8(a)(1) violations. For the foregoing reasons, respondent is confident that a review of the record as a whole and of the applicable law will lead the Court to conclude that the Board's petition for enforcement must be denied.

We vigorously urge such denial forwith so that this litigation may be brought to an end.

January 1966.

Respectfully submitted.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN R. BERKE

Attorney